SUPREME COURT U. S.
FILED
APR 21 1882
JAMES H. McKENNEY, Clerk

Supreme Court of the U. S.

OTIS BIGELOW, Appellant,
vs.
GEORGE A. ARMES, Appellee. } *No. 296.*

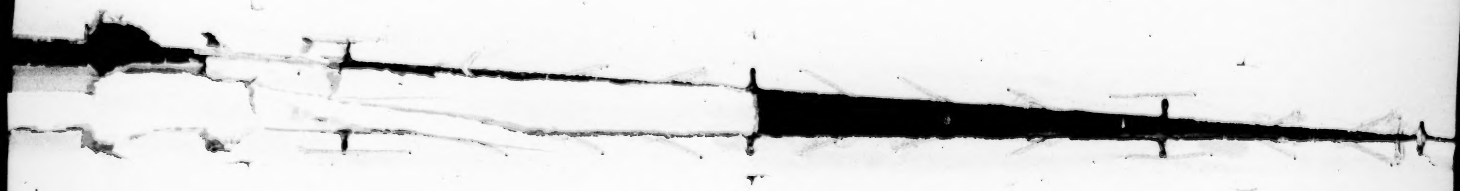
APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief for Appellee, on the Merits, and Supplemental Brief on the Motion to Dismiss.

MERITS.

SYNOPSIS OF TESTIMONY FOR PLAINTIFF.

(Rec. 21.) George A. Armes, the plaintiff. About November 10, 1876, happened in Bigelow's bank. He called me aside and said he had two small houses he would like to exchange for my house on Eighth street, and would give also $500; and about the 18th of the same month I went with defendant and examined the houses—one on Delaware avenue, which I accepted at $1,500, and one on Capitol Hill. I told him I did not want the latter at any price, and he then proposed to give me a farm near Fairfax Court



SUPREME COURT U.S.
FILED
APR 21 1882
JAMES H. McKENNEY, Clerk

Supreme Court of the U. S.

OTIS BIGELOW, Appellant,
vs.
GEORGE A. ARMES, Appellee. } *No. 296.*

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief for Appellee, on the Merits, and Supplemental Brief on the Motion to Dismiss.

MERITS.

SYNOPSIS OF TESTIMONY FOR PLAINTIFF.

(Rec. 21.) George A. Armes, the plaintiff. About November 10, 1876, happened in Bigelow's bank. He called me aside and said he had two small houses he would like to exchange for my house on Eighth street, and would give also $500; and about the 18th of the same month I went with defendant and examined the houses—one on Delaware avenue, which I accepted at $1,500, and one on Capitol Hill. I told him I did not want the latter at any price, and he then proposed to give me a farm near Fairfax Court

House, Va., of 72 acres, in place of it. After ascertaining the condition and location of the land, I offered him my house, subject to $2,000 incumbrance, for the house on Delaware avenue, the farm, and $1,000. He said he did not think it worth over $500 and his two places. He handed me two deeds of the farm and one of the house, and told me Judge Willoughby could tell me all about the farm. I went to see Judge Willoughby, then went back to the bank, and called by and got my brother to go with me. Told him I was about making a trade with Bigelow. After discussing an hour or two in the back room of the bank, Bigelow agreed to give me for my Eighth street house, the farm and the Delaware avenue house, and assume the incumbrance on my Eighth street house, pay me $500 cash, and repair his house. When that was settled, he went behind the counter, and I remarked that we had better have a memorandum in writing; he said no, it was unnecessary. There was then some discussion (Rec., 22,) as to whether he would allow a certain sum of money instead of repairs. I then took a pencil and wrote as follows, as near as I can remember:

"I propose to give my house on Eighth street, subject to an incumbrance of $2,000, for your house on Delaware avenue and your farm in Virginia and $500 cash, and you allow me, in addition, $150 for repairs on the Delaware avenue house."

He declined, scratched out mine and put in $25 for repairs, and signed it; I signed it, too, my brother being present at the time, who read it and handed it over to Mr. Bigelow, saying he might as well keep it. I told him I would get an abstract from Mr. Morsell, and Bigelow said he would have one made of the Delaware avenue property by Mr. Woodward, and would give me a certificate that the farm was all clear, and a warranty deed as soon as his wife returned the city. He obtained his certificate from Mr. Woodward the next day, I think, and asked me if I had mine.

November 24, I and wife signed the deed of Eighth street house to Otis Bigelow. Told him I had a note due in bank, and if he would let me have $400 would give him my deed to hold until his wife returned. Gave me $400, and agreed not to record my deed until his wife returned; ordering at the same time his clerk to make out the deeds of his property to me, which, he stated, would be handed to me immediately on his wife's return to the city. The next day I called in and asked him if he could spare another $100. He at once handed it to me, stating that he had completed my deeds, and everything was ready for his wife's signature, and handed me back the deeds to the farm and house on Delaware avenue. These deeds were in an envelope, marked "Colonel Armes' papers." About ten days later he asked me for the deeds to the farm; said he wanted to make some correction. I let him have them.

About the 11th of December I asked him for the money to repair the house. He gave me an order on a former tenant, who, he said, owed him nearly $50 back rent. (Filed, marked Ex. A.) I had the house repaired and adververtised it for rent. When I learned of his wife's arrival in the city I called on him for the deeds to the farm and house he agreed to give me, and for the money for the repairs of the house, which I was unable to obtain from the party the order was on, as he claimed he did not owe Mr. Bigelow any back rent. Bigelow offered me a check for $20, having interlined in it that it should be in full of all demands, provided I would accept the farm or the house instead of both pieces of property. (Rec., 23.) I declined to accept the check and one of the pieces of property as a settlement, but demanded both, which he declined to give, and "stated that he would go into the courts first before he would deed me both pieces of property, stating I would have the costs to pay and in the end I would not get anything, as he could dispose of my house at any time, and that he had already recorded the deed," &c.

I gave Bigelow no note or memorandum for the money

he gave me. Nothing was said about a note or ever refunding any of said money. This money was given me as a difference in exchange of his farm in Virginia and his house on Delaware avenue for the Eighth street house. I had no other property on Eighth street than house No. 1252. Of the $525, which he agreed to give, I have received $505 in cash. The five was given the day the abstract was given. I conveyed the Eighth street property to Bigelow in pursuance to the agreement. When I got the $400 (Rec., 24) and when I received the $100 (Rec., 25) there was nothing said in regard to any loan whatever. But as I had some money to pay out and his deeds were not ready to be delivered to me, I asked him to let me have the $500 at once; that $400 would do now, and I would call in to-morrow for the other hundred, and handed him my deed, stating he could have the deed in his possession, provided he would not have it recorded until his wife returned; and it was understood at the time between us both that the exchange of property was made, and that I should have the deeds for the farm and house upon the arrival of Mrs. Bigelow. By the delivery of deed for Eighth street house (Rec., 25) I meant that it was his property and the trade closed; he was entitled to it, and only trusted to his honor as to the delivery of his deeds. He has paid me all the money difference he agreed to, with the exception of the $20 for the repairs. I entered upon possession of the Delaware avenue property, in acceptance of part of the property agreed upon, "and he gave me the key of the house, which I advertised for rent as my own property. He gave me the key and the old deed at the same time."

Charles H. Armes testifies as follows, (Rec. 15:) On the 22d of November, 1876, I went with the plaintiff to Bigelow's office. They began talking about a trade of some real estate. Plantiff wanted $1,000 difference in money. Bigelow said he would give $500 and the house on Delaware avenue and the farm in Fairfax county, Va., for the plain-

tiff's house on Eighth street in this city and assume the incumbrance of $2,000 on the Eighth street house. Plaintiff agreed to take it, and suggested making a written memorandum. Defendant said, "There is no use of any writings; I will do as I say. Plaintiff in the meantime commenced writing. While writing, (Rec., 16,) a discussion arose as to repairs on the Delaware avenue house; the plaintiff wanted $150 cash, instead of repairs, and proposed that sum in the writing, but Bigelow consented to allow only $25 for repairs. The plaintiff then drew his pencil throught what he had written about $150 for repairs, so that the writing when signed was as follows; November 22, 1876, I propose to give my house on Eighth street, subject to $2,000, for one house on Delaware avenue and one farm in Fairfax county, Va., and $525 cash. This was signed by the plaintiff and handed to the defendant, Otis Bigelow, who, after reading it, wrote upon it the word "accepted" and signed his name to it. He indicated a place where he would put the writing for safe keeping. A day or two afterwards he came to my office and asked me if an abstract of title to the farm would be insisted upon; referring to the expense of getting one, &c.

I held the incumbrance on the Eighth street house as attorney for the owner. The interest is payable semi-annually, January 1 and July 1. The notes were then and are now long over-due. Bigelow paid $100 interest on the notes a few days before January 1st, (Rec., 17,) and said he could pay the principal almost any time, but would like 30 or more days' notice. He then agreed to pay the principal in the following February. He had the Eighth street house insured. On January 17, 1877, Bigelow said he tore up the memorandum and threw it into the waste basket, but that the pieces might then be in the waste basket; it had not been emptied.

Early in January Bigelow told me he had made out one of the deeds on a form that was signed in blank by his wife, (Rec., 18,) but that thinking such deed illegal, he had torn

it up, and had another made out. January 17, called on Bigelow to produce the writing, but he had destroyed it.

John Cajay says, (Rec., 42,) I reside at 804 F street S.W., in this city. November 23, 1876, I removed from No. 1138 Delaware avenue northeast, lot 14, square 712.

The plaintiff came to me and asked about some back rent. I told him I did not owe any. I then wrote a note to Mr. Bigelow and sent it by a boy. Getting no reply, I went in the afternoon to see Mr. Bigelow and asked him about it, and he told me he had sold the house to Mr. Armes.

EXHIBIT A. (REC., 12.)

WASHINGTON, D. C., *Dec.* 11, 1876.

JOHN CAJAY:

Pay to Col. Geo. A. Armes forty-eight dollars, being for four months' back rent, and he is authorized to receipt for the same in full of all accounts.

OTIS BIGELOW.

Mr. Geo. A. Armes being the owner of the property.

OTIS BIGELOW.

EXHIBIT C. (REC., 13.)

(An old title deed describing the property mentioned in Exhibit D.)

EXHIBIT D. (REC., 14.)

I have examined the title to part of lot fourteen, (14,) in square No. 712, beginning for the same on the west line of Delaware avenue, 15 feet 8 inches from the southeast corner of said lot, and running thence northwestwardly at right angles to said avenue 115 feet, thence south 15 feet to a

point 115 feet from said avenue, thence 115 feet to a point on said avenue 15 feet southerly from the beginning, and thence to the beginning, and report the same good and unincumbered in Otis Bigelow; tax receipts to be produced. Fee paid.

WM. R. WOODWARD,
23d November, 1876.

DEFENDANT'S TESTIMONY. (REC., 26.)

The defendant, Otis Bigelow, testified, substantially, as follows:

That the conversation between him and plaintiff was only with a view to a trade. That there was no trade made, (Rec., 27,)—no trade completed, (Rec., 31.) That C. H. Armes was not present when Exhibit No. 1 was drawn. That the money handed plaintiff was a loan, and the deed of the Eighth street property was given as security. Gave plaintiff possession of the Delaware avenue property as agent to rent it: never gave it as owner.

Cross-examination: Chas. H. Armes *was* present at my office during a conversation concerning the exchange of the real estate described in these proceedings. I think in the morning of the day I signed the writing.

Has not employed the plaintiff to rent the Delaware avenue property since November 22, 1876. (Rec., 30.) *It was before that date. Delivered the key to him since that date.* I afterwards got the key from the parties next door; about the middle of April. It was agreed that I would allow $25 for repairing the house, and that that $25 was to go in as a part of the consideration in this negotiation for exchange. The plaintiff gave no note or memorandum for the money. There was no agreement that he would ever repay it. "The money delivered was considered on my part an accomodation loan." (Rec., 31.) Thinks there was a proposal made to pay plaintiff $500, and $25 for repairs, but it was not ac-

cepted. (Rec., 31–2.) Stated to plaintiff that I would give him the deed from myself and wife for this property on Delaware avenue and in Virginia after my wife returned, in case we could make a fair trade. Mrs. Bigelow returned to this country about the first of January.

ARGUMENT.

Let us look at the acts of the parties, and the facts and circumstances, in their order of succession:

About the middle of November appellant proposed a trade. The parties then examined the property in this city, and appellee obtained satisfactory information about the farm. They met on the 22d of November and agreed upon specific terms. They both then ordered abstracts of title made, and both prepared their conveyances. The appellee executed his, and on or about the 24th delivered it, receiving simultaneously money from the appellant and the key to his house, with an examiner's certificate of title, *which bears date November* 23. (See Ex. D, Rec., 14–15.) On the 25th, upon giving appellee $100, he also gave him back the old title deeds to the house and farm, (which he had had before,) in an envelope marked "Col. Armes' papers." The appellee repaired the house and advertised it for rent. December 11, appellant wrote to John Cajay in reference to back rent of said house, stating expressly that the appellee was "*the owner of the property.*" Appellant arranged for the payment of an over-due incumbrance, paying an installment of interest due and took out a policy of insurance upon the property which appellee conveyed to him.

It is also agreed that in the conveyance of the property which the appellant was to make upon his wife's return to the city, his wife was to join, (Rec., 22, 32.) Accordingly, upon her return, in January following, appellee called upon him for the conveyance. Having been refused, he, without unnecessary delay—on January 23d—commenced this suit.

These are undisputed facts, each and all of them. Now, what did they mean. The appellant has said they meant a loan of money. The appellee says they meant that an exchange of property had been made; and the court in general term concurred unanimously with the appellee.

The following is referred to as indicating the nature of the appellant's conduct, both in his attitude to the Court in his defence, and in his relations to the appellee in this transaction:

At least a month and a half after the transaction, during which time the appellee was in undisturbed possession of the Delaware avenue house, and the appellant in like possession of the Eighth street house, the appellant, being called upon for the consideration for said house, said, practically—"I have your deed on record; I have torn up some of the written evidence showing what I was to give for it; you can get *nothing* by suing me; now, take the $20 balance of money agreed upon *and one of the pieces of real estate*, or nothing. I will give no more." (See Rec., p. 22-3.) Then, an advertisement appearing in the newspapers to rent the Delaware avenue house, the key of which had been left next door, (as is frequently done for convenience of callers,) appellant, about the middle of April, (Rec., 30,) went to the parties next door and got the key and took possession.

It is noticeable that the amount of money—$20—which appellant offered the appellee upon his demand for money to pay for repairs, is the exact difference between the amount already paid—$505—and the amount which had been agreed upon, viz., $525. It is not claimed that appellee came to *borrow* that. The statement of the appellant in his direct examination that the $505 was a loan, is not sustained by his statements on cross-examination. There, he says, (Rec. 30,) the appellee gave him no note for the money, or other memorandum; that there was no agreement that he would ever repay it. Then he says, (Rec. 31,) "*The money delivered was considered, on my part, an accommodation loan.*"

Appellant also sought to have it appear that the delivery of the key of the Delaware Avenue house to appellee was as an agent to rent it; but on cross-examination it is shown that this is also mere pretence, for, when questioned as to whether it was before or since the 22d of November that he employed appellee to rent the house, he replied, "*I think it was before that time I told him to put in a tenant if he could find one:" That he had not so employed him since November 22, and that it was since that time that he delivered the key to him.* (Rec. 30.)

This statement, though obtained with some difficulty, accords with appellant's note to Cajay, the former tenant, in which he informs Cajay that the appellee is *the owner of the property.*

Further, on the subject of this delivery of possession, appellant does not cling very tenaciously to his theory of agency, but says, also, that he let appellee have possession as a favor to repair it. This is equally out of accord with the note to Cajay and with Cajay's testimony, for he testifies that Mr. Bigelow told him that he had sold the house to Mr. Armes, (Rec., 43;) and appellee makes oath that he took possession, repaired it, and advertised it for rent as his own property. And, could the delivery of the old title deeds and the order of appellee to his clerk to prepare conveyances *have any* bearing upon or connection with a delivery of possession for the purpose of renting or repairing? And, too, the appellant admits, on cross-examination, that *in the negotiation for the exchange it was agreed that* $25 "should go in as a part of the consideration."

Now, as to the amount of money agreed upon. In his answer, the appellant says the appellee's proposition was to give his Eighth street house for appellant's farm and Delaware avenue house, "*the house to be put in good repair or* $650 *cash,*" (Rec., 8.) In his testimony, he puts the money part *at* $1,500, *instead of* $650, (Rec., 27,) while, on his cross-examination, he admits that the proposition was that appel-

lant should pay $500 difference and $25 for repairs. (Rec., 30, 31, 32.)

Again, as to payment of the installment of interest on the incumbrance, and his promise to pay the principal. Here his fabrication is easily demonstrated. He says the rents of the Eighth street house were turned over to him for the purpose of paying the interest. It will be observed that the house was renting for $30 per month, (Rec., 4.) It was turned over to him November 24th. He paid the installment of interest—$100—in the latter part of December, (Rec., 17.) *when he had received but one month's rent.* But he does not pretend that anything was turned over to him *to pay the principal, which was then overdue*, and yet he arranged for the payment of that in the following February. This is not denied.

As for the attempt of the appellant to show that the witness, who is one of appellee's counsel, was not present on the 22d of November, during the making of said contract, no argument is offered, further than to invite attention to the cross-examination of the appellant, where, to the question, "Was not I (Charles H. Armes) present at your office on the 22d of November, 1876, when the conversation was had between you and the plaintiff in reference to the exchange of this Eighth street house for your house on Delaware avenue and your farm in Virginia?" he answered, "Yes." (See Rec., pp. 28-9, Int. No. 36, 37, 38.)

The bill alleges fraud; and these persistent efforts of Bigelow to mislead the court as to the facts in the case are in harmony with his conduct in destroying the writing, trying to compel acceptance of one of the two pieces of property referred to in it, and then, some two months after the bill was filed, getting the key from the parties next door and taking possession of the property surreptiously, which

he admits, verbally and in writing, that he had sold to appellee.

Now he relies upon the statute of frauds to defeat the recovery of the agreed consideration for the house he received from the appellee.

It is confidently urged that the appellant cannot set up the statute, nor any rules of evidence, to defeat justice under such circumstances. Now, first, what did appellant agree to give for the Eighth street house; and, then, second, is it competent to show it?

First. The parties agreed upon *something;* for the appellee made and signed a written proposal, which, after a slight modification agreed upon, the appellant accepted and signed also. It was, in substance when signed, as follows:

"November 22, 1878. I propose to give my house on Eighth street, subject to an incumbrance of $2,000, for your house on Delaware avenue and your farm in Virginia, and $525 cash.

"GEO. A. ARMES.

"Accepted. OTIS BIGELOW."

What was the property? Bigelow admits that this farm and house—"referred to in these proceedings"—(Rec., 28–9) were the subjects of the negotiation, (Rec. 32,) and that he gave the appellee old title deeds of each of them, as descriptive of the property, (Bill, Rec. 2, ans. R. 9.) The money to be paid was specifically stated in the writing. The appellee owned but one house on 8th street, and the appellant had examined that. So that, so far as certainty as to the property is concerned, it is difficult to perceive what could be added to make it more certain. As to the quantity of the interest to be conveyed, the law presumes a fee. "A general agreement to sell real estate is presumed to

mean the fee simple." (Waterman, Sp. Per., §419.) "An agreement to sell a house imports an agreement to convey the title thereof in fee." (Hurley *vs.* Brown 98 Mass., p. 549.)

This written proposition, accepted in writing and signed by both the parties, (to which was supplemented old title deeds as definitely descriptive of the property,) was probably a sufficient memorandum under the statute of frauds, even had there been no affimance of the contract and acceptance of benefits thereunder; for it is competent to identify the property by parol evidence. (Ib., Waterman, §238.)

The words, "by my purchase of your ½ E. B. wharf and premises, this day, as agreed on between us, $7,578.63," brief as they are, contain a condensed summary of all the essentials to a complete contract. "E. B. may be as definitive a description of locality as F street, and then the ambiguity could only arise if it be shown that the bargainor had more than one house on F street." It is competent to show that the letters "E. B." mean Eastern Branch. (Barry *vs.* Coombe, 1 Pet., at 652–3.) Approved in Williams *vs.* Morris, 95 U. S. 444.

The "medium of explanation suggested on the face of the memorandum," in the above case, referred to by appellant's counsel, was the name of the stream on which the wharf was located.

"A written agreement to sell a house 'on Church street' is sufficient, and parol evidence is admissible to identify it." (Meade *vs.* Parker, 115 Mass., 115.)

But here the contract has been entirely performed on one part, and largely so on the other part.

The truth as to the delivery of the deed by appellee and the receipt of the money is plainly this: The contract which had been made could not be carried out *by Bigelow* until his wife returned to the city, but the appellee, being in need of some money, proposed to execute his part of the agreement

at once if Bigelow would let him have the *money* agreed upon. To this Bigelow had no objection, and they proceeded *in execution of the agreement already made.* The appellee delivered his deed, and received all the money agreed upon (except $20) and the key of the Delaware avenue house, and appellant directed his clerk to prepare the conveyances.

The delivery of the deed in this instance was unquestionably a delivery either for the purpose of security for a loan, *or in pursuance of the agreement on the part of the grantor.* If it was done in pursuance of the agreement, then the other acts of the parties—the delivery of the key of the Delaware avenue house, the statement of Bigelow, and his letter to John Cajay—have their natural and reasonable connection and place in the history of this transaction. Bigelow makes no attempt to explain this letter; *he makes no allusion to it whatever.* Can he claim that he wrote Cajay a falsehood?

If, on the other hand, the deed was delivered as security for the money, then these acts, and other acts of the parties above referred to, have no intelligent connection or meaning whatever. The only sense in which it can be said that the deed was delivered *as security* seems to be this: that the execution of a part of the agreement by paying any of the money—no promise being made to repay it, and nothing being said about a loan—and having nothing to show what it was paid for, would leave him insecure and unsafe, while to take the deed would make the matter quite secure and absolutely safe. In this sense, however, every deed is taken as security.

The deed was in fee and it speaks for itself; and the appellant, while relying upon the statute of frauds, claims the privilege of varying its terms to a trust.

In Virginia, performance by the complainant of his part of a parol agreement to convey lands is sufficient ground for specific performance. (Caldwell *vs.* Carrington, 9 Pet., 86.)

Second: Appellant having fraudulently destroyed the writing, it is competent to prove the contract by other evidence.

The appellant has affirmed the contract and accepted the benefits thereof, and it is a rule that

"A party by actively affirming a contract or purchase * * is estopped thereafter to deny its force or effect." (Bigelow on Estoppel, 511, citing Smith *vs.* Sheely, 12 Wall., 358; Morris *vs.* Hall, 41 Ala., 510.)

ON MOTION TO DISMISS.

A motion to dismiss this appeal was filed by the appellee, in February, 1881, and printed briefs thereon were filed, but the court postponed the hearing until the case was reached for hearing on its merits.

The motion to dismiss is upon two grounds:

First, because the matter in dispute does not exceed the value of $2,500.

Second, because no sufficient appeal bond has been filed.

First. The matter in dispute is not worth $2,500; and, as this court has jurisdiction of cases from the Supreme Court of the District of Columbia, only where the matter in dispute exceeds $2,500, this appeal should be dismissed for want of jurisdiction.

R. R. Co. *vs.* Grant, 98 U. S., 398.
R. R. Co. *vs.* Trook, 100 U. S., 112.

Where the judgment is for the plaintiff, jurisdiction depends on the value of the matter in dispute, *in this court*, and not upon the claim in the court of original jurisdiction, (Walker *vs.* U. S., 4 Wall., 163; Gordon *vs.* Ogden, 3 Pet., 33,) "for the amount in controversy, as to the defendant, is fixed by the judgment." *Ib.*, 4 Wall., 163.

The fact that on the principle upon which this decree is made, an application for affirmative relief, had such been made by the appellant, involving more than $2,500, would have been refused, does not affect the question of jurisdiction *on this appeal.*

If the appellant had paid off the incumbrance of $2,000, and asked affirmative relief herein through a decree for reimbursement thereof, together with the $505 paid the appellee, (on his theory that the Eighth street deed was delivered as a trust only,) the fact that in such case such application might properly have been refused, upon the principles involved in this decree, does not give jurisdiction on this appeal, where the property mentioned in the decree does not exceed $2,500.

But Bigelow does not claim affirmative relief in this cause.

In Lamar *vs.* Micou, No. 998, present term, it was held that *where the decree against the defendant is for less than* $5,000, *and she appeals, the fact that the decree should have been for more than* $5,000 *cannot be urged by the defendant in order to give this court jurisdiction.*

This appeal involves the interest of Otis Bigelow only, and not that of his wife; *the bill stands dismissed as to her.* (Record, 48.)

The statements, in the record, as to the value of the farm and house in question, contemplate a conveyance by Otis Bigelow *and his wife*, (Rec., p. 4, par. 11; pp. 18, 22 and 32;) and there is nothing in the record to indicate the value of the property, with a conveyance from Otis Bigelow only, and the decree is against him only. (Rec., 48.) The record, the statements in which contemplate the interest of the two, is silent as to the value of the interest of one alone.

The appellee states, in his bill, that *the deeds of the aforesaid property were to be given as his deed was given, "with release of right of dower,"* and this is sustained by the testimony. (Rec., 18, 22 and 32.) That such release is contemplated will

be *implied*, if the contrary is not expressed. See Waterman on Spec. Performance, §414; 1 Edw., ch. 1; 38 Iowa, 507; 7 Ind., 73.

Inchoate right of dower is an incumbrance, (Waterman on Spec. Per., §410; and N. 3, citing Shearer *vs.* Ranger, 22 Pick., 447, and other cases,) and the value would be ascertained and deducted from the purchase money *upon a sale of the premises by the appellee*, (Holmes *vs.* Holmes, 12 Barb., S. P., 144–5; Ib., 22 Pick., 447,) and the value thereof may be ascertained by established rules. (Davis *vs.* Parker, 14 Allen, 94; Jackson *vs.* Edwards, 7 Paige, Ch. 408.) See, also, Scribner on Dower, Appendix H., 768.

In Davis *vs.* Parker, 14 Allen, (at p. 104,) for specific performance, the court say: "The defendant alleges that he is unable to procure a release of his wife's right of dower in the land. If this be so, the plaintiff is entitled to a conveyance without this right, if he elects to receive it, and to a reduction from the purchase money of the value of the incumbrance. The general rule, as stated in *Hill vs. Buckley*, 17 Ves., 394, is that the purchaser shall have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation. The principle applies to an incumbrance of any amount. The amount to be deducted is the value of the wife's right at the time of the conveyance, and not the difference between the market value of the whole land with her release and the value without it. The rule should be the same as if the conveyance had been made with a warranty against the right of dower, and the existence of the right had afterwards been discovered and an action had been brought to recover damages for a breach of the covenant. (See *Woodbury vs. Luddy*, *Ante* 1.) If the defendant cannot, by a day to be fixed by the decree, obtain a release of his wife's right of dower, the cause should be sent to a master to ascertain the value of the right, and the sum fixed must be deducted from the purchase money."

In Woodbury *vs.* Luddy, Ib. 1, there appeared to be no instigation on the part of the husband to procure a refusal

of the wife to join in the deed, but she having refused, a conveyance by him was decreed, with compensation equal to the value of her inchoate right of dower.

What, then, is the value of the matter in dispute? It is incumbent upon the appellant to show affirmatively that the sum is sufficient to give jurisdiction. (Hagan *vs.* Foison, 10 Pet., 160.)

1. *It does not appear in the record that the amount is sufficient.* The consideration at which the appellee was to take said property, *with a release of said dower right*, was $1,500 for the house and $1,000 for the farm, (Rec., 3.) By the decree Otis Bigelow is to convey said property and pay $20 in money. If, therefore, the inchoate right of dower of Mary R. Bigelow, wife of said Otis, were of *less value than said sum of* $20, it might, perhaps, be argued that the matter involved appears in the record to equal or exceed $2,500 in value. This, however, does not appear in any form. The appellant does not allege it by affidavit (Ib., 10 Pet., 160) or otherwise.

Inchoate right of dower is of value; and the authorities are numerous that a relinquishment of it is a valid consideration in a contract. Is it, as a matter of fact in this case, of the value of $20? In the absence of evidence that it is, the court will not infer, or presume, that it is.

2. *It appears from the record that the amount is not sufficient.* The value of the appellant's interest in said real estate does not, in the most favorable aspect of the record, exceed $2,425; to which add the $20 decreed to be paid in money, and the entire value is but $2,445.

In the District of Columbia the dower interest of a healthy woman in her husband's lands when sold cannot be more than $\frac{1}{6}$ nor less than $\frac{1}{20}$ of the net proceeds. (Alex. Ch. Pr., 158.) Calculating the dower interest of the appellant's wife at the lowest possible amount, $\frac{1}{20}$ of the value of the

house in this District, it amounts to $75, which amount deducted from the assumed value of the house and farm, leaves $2,425. By process of calculation of the wife's interest in the farm in Virginia, according to the laws and practice of that State, it is apparent that the value of the appellant's interest in the land, without a release of his wife's interest, is much less than $2,500.

The appellee might properly have appealed from the decree of the general term on the ground that no compensation was decreed for this dower right, and no reference made to ascertain the value of the same, (Wingate *vs.* Hamilton, 7 Ind., 73.) Had such a reference been made, a report showing the value of the inchoate right of dower of appellant's wife would have shown *more clearly* the insufficiency of the amount of the appellant's interest in the property to give jurisdiction; though the fact may sufficiently appear in the absence of such demonstration.

3. The fact is shown by affidavits filed by the appellee with the motion, which are not contradicted, that the value of the real estate mentioned in the decree does not exceed $1,050, exclusive of the dower right of appellant's wife. Affiant B. H. Warner says that the Delaware avenue property is not, in his opinion, worth more than $700; and Affiants Wooster and Broadwater say, that in their opinion, the value of said farm, without such a relinquishment, does not exceed $5 per acre—$350 for the 70 acres.

These affidavits were filed with the motion to dismiss, and are printed at pp. 4, 5 and 6 in appellee's brief first filed on the motion.

Second. The appeal bond is defective, and there has been no offer to file a perfect one.

1. The bond vouches for the prosecution of an appeal in which "Otis Bigelow *et al.*" are appellants, (Rec., 50,)